IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 944

HERSHEY MFG. CO.

Appellant,

vs.

BENJAMIN S. ADAMOWSKI, et al.

Appellees.

PETITION FOR REHEARING.

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The Scheffer Press, Inc.—ANdover 3-6850

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To The Honorable Chief Justice Of The United States And The Associate Justices of the Supreme Court.

Petitioner, Hershey Mfg. Co., prays that this Court grant this petition for rehearing, vacate its order of June 29, 1959, which affirmed the judgment of the District Court, reverse said judgment and remand the cause to the District Court with directions to dismiss for mootness if the State court proceedings hereinafter described have proceeded to judgment or, if otherwise, to take other appropriate action.

On June 29, 1959, the last day of the October, 1958 Term of the Court, the following decision was rendered: "Per Curiam. The judgment is affirmed. Although the District Court had jurisdiction, *Doud* v. *Hodge*, 350 U.S. 485, we accept its *finding* that there was no *showing* of irreparable injury". (Italics added.)

We respectfully suggest that the language of the Court in the foregoing short per curiam opinion clearly indicates that the Court was under the impression that the judgment of the District Court followed a trial on the merits and findings of fact, whereas there was no trial on the merits and no findings.* The District Court's action followed motions to dismiss, which by their nature admitted the allegations of the complaint including allegations of irreparable injury as shown by the jurisdictional statement Pages 7 and 8. This case is unlike *Doud* v. *Hodge*, 350 U.S. 485, wherein the District Court had a trial on the merits and made findings of fact. This Court having determined that the District Court had jurisdiction should have reversed and remanded the cause to the District Court.

However, because of the continued denial to appellant of the right to run its business without threat of enforcement of the challenged statute and the indisposition of the Court to grant relief, appellant on July 1, 1958, filed a complaint for injunction in the Superior Court of Cook County, Illinois against the Appellee Adamowski and the cause is now set for trial in that court for September 28, 1959.

In the event that the State Court proceeds to judgment these proceedings will be rendered moot. In the meantime

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* Judge Perry, the Emergency Judge who was not a member of the panel of three judges, heard evidence on a motion for a temporary restraining order pursuant to Title 28 U.S.C. §2284(3) and the transcript of that evidence is included in the record on appeal (R. 68). Judge Perry found that appellant would suffer irreparable injury unless the temporary restraining order issued (R. 59-60) and his finding was fully supported by the evidence before him. The three-judge court which acted on the motions to dismiss heard no evidence and did not purport to review Judge Perry's findings on the evidence which Judge Perry heard.

the District Court could proceed to trial or stay proceedings pending a State court determination.

In any event the language of this Court's short per curiam opinion conveys the erroneous impression that there was a trial on the merits and findings of fact in the District Court and that language ought to be corrected so that the record is accurate and no claim of *res judicata* on the issue of irreparable injury could conceivably be made.

For the foregoing reasons your Petitioner prays that the order affirming the District Court judgment be vacated, and the Court enter an order reversing the District Court judgment and remanding with directions to dismiss for mootness if the State court proceedings have proceeded to judgment or, if otherwise, to take other appropriate action.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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Being one of the counsel
for petitioner.